



Rossella Bottoni

(Associate Professor of Law and Religion at University of Trento, Faculty of Law)

**Religion, citizenship and migration:
beyond the 'West versus non-West' approach ***

ABSTRACT: In a controversy concerning the legitimacy of the wearing of the Sikh kirpan in the public space, the Italian Court of Cassation stated that immigrants have the obligation to conform their values to those of the Western world. This is but one case when a migrant's religion has been assumed - in the public and political debate and in courts - to draw a line between what belongs to the Western civilization and what does not. This paper aims to challenge the 'West versus non-West' approach, by examining the interplay between religion, citizenship and migration, and by stressing that democratic countries are such only as long as they remain pluralist and accommodate diversity. Although limitations on unacceptable manifestations of religion do apply, these must pursue only legitimate aims under international standards, which do not include such a thing as the protection of Western values.

SUMMARY: 1. Religion and citizenship - 2. Religion and migration - 3. The controversial stance on religion, citizens and migrants - 4. Promoting Western values or international standards of human rights protection? - 5. Concluding remarks.

1 - Religion and citizenship

Religion has always been strictly linked to citizenship. In Europe, in the past, only members of the State religion belonged with full rights to the political community, while those who professed a minority religion were discriminated at best and persecuted or expelled at worst. With the passing of time, and as a result of the process of emancipation, religion ceased to be a factor determining citizenship as a legal status: everybody came to be recognized equal before the law regardless of their religion or

* Article submitted to a double-blind revue - Contributo sottoposto a valutazione.

Paper presented at the Conference "*Religion and Immigration*", organized by the International Network for Interreligious Research and Education (INIRE), Bar-Ilan University (Israel), on 7-9 June 2022.



belief, and to be entitled to the right to religious freedom¹. Nevertheless, religion has remained a basic element of citizenship as national identity.

At the legal level, a number of constitutions of the member states of the Council of Europe include religion-specific references². Some mention an official Church/religion³ - a clause which is regarded as consistent with the international standards of human rights protection, provided that the legal system of the country concerned does not discriminate against people having a different religion or belief, or against religious or belief minorities⁴. Other constitutions include references to God⁵, the Trinity⁶ or

¹ **R. BOTTONI, C. CIANITTO**, *The Legal Treatment of Religious Dissent in Western Europe: A Comparative View*, in *Ecclesiastical Law Journal*, 2022, 24/1, pp. 25-37.

² **S. FERRARI**, *Dio, religione e costituzione*, April 2004 (available at <https://docenti.unimc.it/giuseppe.rivetti/teaching/2015/14424/files/lezione-24-02-16-dio-e-costituzioni>).

³ "The Evangelical Lutheran Church shall be the National Church of Denmark and, as such, it shall be supported by the State" (Art. 4 of the Danish constitution); "The prevailing religion in Greece is that of the Eastern Orthodox Church of Christ. [...]" (Art. 3 of the Greek constitution); "The Evangelical Lutheran Church shall be the National Church in Iceland and, as such, it shall be supported and protected by the State" (Art. 62(1) of the Icelandic constitution); "The Roman Catholic Church is the National Church and as such shall enjoy the full protection of the State; [...]" (Art. 37(1) of Liechtenstein's constitution); "The religion of Malta is the Roman Catholic Apostolic Religion" (Art. 2, § 1 of the Maltese constitution); "The Catholic, Apostolic and Roman religion is the religion of the State" (Art. 9 of Monaco's constitution); "[...] The Church of Norway, an Evangelical-Lutheran church, will remain the national Church of Norway and will as such be supported by the State. [...]" (Art. 16 of the Norwegian constitution).

⁴ Paras. 9-10 of the Human Rights Committee's general comment 22 (text available at <https://www.ohchr.org/en/special-procedures/sr-religion-or-belief/international-standards>).

⁵ "We, the people of Albania, proud and aware of our history, with responsibility for the future, and with faith in God and/or other universal values [...]" (preamble to the Albanian constitution); "Conscious of their responsibility before God and man [...]" (preamble to the German constitution); "God bless the Hungarians [...]" (preamble to the Hungarian constitution); "[...] God, bless Latvia!" (preamble to the Latvian constitution); "We, the Polish Nation - all citizens of the Republic, Both those who believe in God as the source of truth, justice, good and beauty, As well as those not sharing such faith but respecting those universal values as arising from other sources, [...] Recognizing our responsibility before God or our own consciences [...]" (preamble to the Polish constitution); "In the name of Almighty God! [...]" (preamble to the Swiss constitution); "[...] realizing the responsibility in the eyes of God, before our own conscience [...]" (preamble to the Ukrainian constitution).

⁶ "In the name of the Holy and Consubstantial and Indivisible Trinity" (preamble to the Greek constitution); "In the name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred, We, the people of Ireland, humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial, [...]"



specific religious heritage⁷. Hungary's Fundamental Law of 2011 is especially interesting, because it contradicts the assumption that the most confessionalist clauses are the oldest ones, which were adopted at a time when the process of secularization was less advanced.

"The emphasis on Christianity ("We are proud that our King Saint Stephen built the Hungarian State on solid grounds and made our country a part of Christian Europe," "the role of Christianity in preserving nationhood" as well as the "God bless the Hungarians" in the opening line of the constitution) and in particular on Catholicism (the reference to "King Saint Stephen" right at the beginning and to the "Holy Crown which embodies the constitutional continuity of Hungary's statehood and unity of the nation" towards the middle of the preamble) is remarkable in European constitutionalism. Giving normative strength to these religious references under Article R(3) is arguably out of line with post WWII-European constitutionalism"⁸.

At the sociological level, the resurgence of religion in the contemporary world - aptly defined by Gilles Kepel as "God's revenge"⁹ - is a very well-known and widely studied phenomenon. José Casanova has authored one of the most prominent studies on

"the revitalization and the assumption of public roles by precisely those religious traditions which both theories of secularization and cyclical theories of religious revival had assumed were becoming ever more marginal and irrelevant in the modern world"¹⁰.

At the political level, national minorities (including those based on

(preamble to the Irish constitution).

⁷ "Our values will remain our Christian and humanist heritage. [...]" (Art. 2 of the Norwegian constitution); "[...] Mindful of the spiritual bequest of Cyril and Methodius [...]" (preamble to the Slovak constitution); "[...] Beholden to our ancestors for their labours, their struggle for independence achieved at great sacrifice, for our culture rooted in the Christian heritage of the Nation and in universal human values, [...]" (preamble to the Polish constitution).

⁸ **C. DUPRÉ**, *Human Dignity: Rhetoric, Protection, and Instrumentalisation*, in *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law*, ed. by G.A. TÓTH, Central European University Press, Budapest, 2012, pp. 146-147. See also **EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION)**, *Opinion on the new constitution of Hungary*, 20 June 2011, paras. 31-32 and 38 (available at [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2011\)016-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)016-e)).

⁹ **G. KEPÉL**, *La revanche de Dieu. Chrétiens, juifs et musulmans à la reconquête du monde*, Le Seuil, Paris, 2003.

¹⁰ **J. CASANOVA**, *Public Religions in the Modern World*, The University of Chicago Press, Chicago, p. 5.



religion) have been exploited as pawns in geo-political chess games. This has been the case of Turkey's Greek-Orthodox and Greece's Muslim Turkish minorities, victims of a perverted interpretation of the clause of reciprocity under Art. 45 of the 1923 Lausanne Treaty¹¹. This norm, which in fact established a regime of parallel obligations, has been used by both countries to justify the mistreatment of their own minorities. The non-compliance by one of the states has been regularly invoked by the other to justify its own violation of the legal regime on minority protection. Likewise, the discrimination against the members of a minority in one country has been adduced as a pretext for the adoption of similar restrictive rules or policies. This has led to the paradoxical result that both Turkey and Greece have punished their own citizens for something committed by the members of another political community¹². As noted by the Parliamentary Assembly of the Council of Europe,

«[w]hile the “kin states”, Greece and Turkey, may consider that they have responsibilities towards members of religious minorities in the neighbouring country, it is actually first and foremost the countries where the minorities live which are responsible for their own citizens, including the members of the respective religious minorities»¹³.

More recently, “issues of minority rights” have been used “as a pretext for the invasion” of Ukraine by Russia¹⁴. Although the majority of the citizens of both countries share the same religion (Eastern Orthodox Christianity), this plays an important role in the conflict¹⁵. Ukraine is the cradle of Slavic

¹¹ “The rights conferred by the provisions of the present Section on the non-Moslem minorities of Turkey will be similarly conferred by Greece on the Moslem minority in her territory” (text available at <https://treaties.un.org/doc/publication/unts/lon/volume%2028/v28.pdf>).

¹² S. AKGÖNÜL (ed.), *Reciprocity. Greek and Turkish Minorities. Law, Religion and Politics*, Istanbul Bilgi University Press, Istanbul, 2008.

¹³ **PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE**, Resolution 1704 (2010) *Freedom of religion and other human rights for non-Muslim minorities in Turkey and for the Muslim minority in Thrace (eastern Greece)*, 27 January 2010, paras. 5 and 7-9 (available at <https://assembly.coe.int>).

¹⁴ **ADVISORY COMMITTEE ON THE FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES**, *Statement on the Russian aggression against Ukraine*, 20 May 2022, para. 1 (available at <https://rm.coe.int/acfc-statement-on-the-russian-aggression-against-ukraine-2022-05-20/1680a69959>).

¹⁵ “President Vladimir Putin of the Russian Federation has cited several issues motivating his invasion of Ukraine. These include [...] the threat of a crackdown on the Russian Orthodox Church in Ukraine (ROCU)” beside «the encroachment of NATO upon Russia, Ukraine as an indivisible part of a multinational Russia, the threats posed by



Orthodoxy, whose origins date back to the so-called *Baptism of Kyivan Rus'* at the end of the 10th century¹⁶. The Patriarchate of Moscow has defined Kyiv as “the southern capital of Holy Rus” and “our Jerusalem and Constantinople”¹⁷, and it holds that Ukraine belongs to its own canonical territory¹⁸ - a principle which it believes was breached with the proclamation of the autocephaly of the Orthodox Church of Ukraine on 5 January 2019¹⁹. Further, it has elaborated a notion of spiritual mission that accompanies well the promotion of the Russian Federation’s interests in foreign policy. Moscow competes with the Patriarchate of Constantinople for the leadership of Eastern Orthodox Christianity, just like it enhances its role of Great Power in the international arena. In this process, the ecclesiastical and civil authorities support each other²⁰.

2 - Religion and migration

Despite the widespread perception that migration poses unprecedented

“decadent” European values, violations of the rights of Russophones in Ukraine, [...], and the prevalence of neo-Nazis in the Ukrainian government» (N. DENYSENKO, *Ukrainian Autocephaly: A Challenge to Russian Neo-Imperialism*, 17 April 2022, at <https://canopyforum.org/2022/04/17/ukrainian-autocephaly-a-challenge-to-russian-neo-imperialism>).

¹⁶ I. ALFEEV, *La Chiesa ortodossa russa*, Vol. 1, *Profilo storico*, Edizioni Dehoniane, Bologna, 2013, p. 96.

¹⁷ Quoted by M.D. SUSLOV, «Holy Rus»: *The Geopolitical Imagination in the Contemporary Russian Orthodox Church*, in *Russian Politics & Law*, 2014, 52/3, p. 78.

¹⁸ Under Art. 3 of Title I (General provisions) of the Statute of the Russian Orthodox Church, as amended in 2013, “[t]he jurisdiction of the Russian Orthodox Church shall include persons of Orthodox confession living on the canonical territory of the Russian Orthodox Church in the Russian Federation, Ukraine, the Republic of Belarus, Moldova, the Republic of Azerbaijan, the Republic of Kazakhstan, the People’s Republic of China, the Republic of Kirghizia, the Republic of Latvia, the Republic of Lithuania, the Republic of Tajikistan, Turkmenia, the Republic of Uzbekistan, the Republic of Estonia, Japan and also Orthodox Christians living in other countries” (English translation available at <https://mospatusa.com/files/STATUTE-OF-THE-RUSSIAN-ORTHODOX-CHURCH.pdf>).

¹⁹ English translation of the τόμος available at <https://ec-patr.org/patriarchal-and-synodal-tomos-for-the-bestowal-of-the-ecclesiastical-status-of-autocephaly-to-the-orthodox-church-in-ukraine>.

²⁰ A. CURANOVIĆ, *The attitude of the Moscow Patriarchate towards other Orthodox churches*, in *Religion, State & Society*, 2007, 35/ 4, pp. 301-318, and *Russia’s Mission in the World. The Perspective of the Russian Orthodox Church*, in *Problems of Post-Communism*, 2019, 66/4, pp. 253-267; A. EVANS, *Forced Miracles: The Russian Orthodox Church and Postsoviet International Relations*, in *Religion, State & Society*, 2002, 30/1, pp. 33-43.



problems²¹, it is well known that this phenomenon has always accompanied and, in fact, predates human history. Several earlier Homo species left Africa and got dispersed all over the world before the evolution of Homo Sapiens²². Migrations have had a foundational role also in some religions' history, like the Exodus in Judaism²³ and the Hijra in Islam²⁴. Each historical period and geographical area have been characterized by specific features, challenges and opportunities²⁵.

²¹ According to Sarli and Mezzetti, it is especially the literature in Europe that «sees migrants' religion as a problem and a potential source of conflict, in line with a social attitude widespread across the continent», while “[t]he North American literature on migration - particularly the US one - tends to see religion as a factor fostering integration, by playing a role in addressing migrants' social needs” (A. SARLI, G. MEZZETTI, *Religion and Integration: Issues from International Literature*, in *Migrants and Religion: Paths, Issues, and Lenses A Multi-disciplinary and Multi-sited Study on the Role of Religious Belongings in Migratory and Integration Processes*, ed. by L. ZANFRINI, Brill, Leiden, 2020, p. 433).

²² Y.N. HARARI, *From Animals into Gods. A Brief History of Humankind*, CreateSpace Independent Publishing Platform, 2012.

²³ J.S. BADEN, *The Book of Exodus. A Biography*, Princeton University Press, Princeton, 2019. On the significance of the Exodus outside the Jewish world, see M. WALZER, *Exodus and Revolution*, Basic Books, New York, 1986.

²⁴ “The Hijra was a turning point in the life of the Prophet and a landmark event in the history of Islam. [...] The importance of the Hijra was so overwhelming in Muslim minds that during the caliphate of ‘Umar ibn al-Khattab when an Islamic calendar was devised, its starting point was set in the year in which the Hijra took place” (M. AL-FARUQUE, *Hijra*, in *Muhammad in History, Thought, and Culture. An Encyclopedia of the Prophet of God*. Vol. I: A-M, ed. by C. FITZPATRICK, A.H. WALKER, ABC-Clio, Oxford, 2014, p. 257). In our times, the Hijra has nourished jihadist ideology and has motivated foreign fighters. See inter alia M. BOMBARDIERI, *Le militanti italiane dello Stato Islamico*, 14 December 2018 (at <https://www.ispionline.it/it/pubblicazione/le-militanti-italiane-dello-stato-islamico-217> 96). In examining the Koranic verses of the Medinese period, Paolo Branca has noted a frequent association between words deriving from the root H-J-R and stressing the willingness to emigrate, and words deriving from the root J-H-D and referred to the fight in favor of the faith. P. BRANCA, *Il Jihād nel Corano*, in *Guerra santa, guerra e pace dal Vicino Oriente antico alle tradizioni ebraica, cristiana e islamica*, Atti del convegno internazionale (Ravenna 11 maggio-Bertinoro 12-13 maggio 2004), ed. by M. PERANI, La Giuntina, Firenze, 2005, p. 312.

²⁵ P. MANNING with T. TRIMMER, *Migration in World History*, Routledge, New York, 2013; W. GUNGWU (ed.), *Global History and Migrations*, Routledge, New York, 2018. Regional and national histories include N. BOSE (ed.), *South Asian Migrations in Global History. Labour, Law and Wayward Lives*, Bloomsbury Academic, London, 2021; L.P. MOCH, *Moving Europeans. Migration in Western Europe since 1650*, Indiana University Press, Bloomington, 2003; D.R. GABACCIA, *Emigranti: le diaspore degli italiani dal Medioevo a oggi*, Einaudi, Torino, 2003.



The 21st century is characterized by the crisis of citizenship caused by globalization²⁶, while the terrorist attacks since 11 September 2001 have linked “Muslim” and “terrorist”²⁷. This has added a new dimension to the association of ideas existing in the West²⁸ between “migrant” and “Muslim”²⁹, resulting in the combination migrant-Muslim-terrorist³⁰. Migration has increasingly been perceived of as a security threat not only to national identity but also to physical safety³¹, although “there is little evidence that more migration unconditionally leads to more terrorist activity, especially in Western countries”³². Migration and terrorism, taken alone or jointly, have also justified the adoption of measures restricting the manifestation of fundamental freedoms, including freedom of religion or

²⁶ S. CASTLES, A. DAVIDSON (eds.), *Citizenship and Migration. Globalization and the Politics of Belonging*, Routledge, New York, 2000.

²⁷ See J. CESARI (ed.), *Muslims in the West after 9/11. Religion, Politics and Law*, Routledge, New York, 2010.

²⁸ On the concept of ‘West’, see **G. ROBBERS**, *Geopolitics of the right to freedom of religion: Western perspectives*, in *Routledge Handbook of Freedom of Religion or Belief*, ed. by S. FERRARI, M. HILL QC, A.A. JAMAL, R. BOTTONI, Routledge, New York, 2021, pp. 159-160.

²⁹ The literature on religion and migration in Europe is characterized by a special focus on Muslims. See **F. FLEISCHMANN**, *Researching religion and migration 20 years after ‘9/11’: Taking stock and looking ahead*, in *Zeitschrift für Religion, Gesellschaft und Politik*, 2022, pp. 1-26.

³⁰ «[I]n addition to being the target of the prejudice and discrimination that exists towards all non-Western immigrants, Muslim immigrants are also subjected to specific prejudices, stereotypes and discrimination because of their religion. Examples of this can include negative attitudes towards Muslim women wearing headscarves or that people connect Muslims to crime or terrorism» (**D.A. BELL, M. VALENTA, Z. STRABAC**, *A comparative analysis of changes in anti-immigrant and anti-Muslim attitudes in Europe: 1990-2017*, in *Comparative Migration Studies*, 2021, 9, p. 1).

³¹ This shift has eased the adoption of measures restricting civil liberties. The securitization of migration tends to promote a cohesive opinion, because “concern for physical safety is a unifying threat”. By contrast, the alleged cultural threats posed by migration “often polarize public and elite opinion because they spring from prior political orientations and values, or ideology” (**G. LAHAV, M. COURTEMANCHE**, *The Ideological Effects of Framing Threat on Immigration and Civil Liberties*, in *Political Behavior*, 2012, 34/3, p. 483).

³² **M. HELBLING, D. MEIERRIEKS**, *Terrorism and Migration: An Overview*, in *British Journal of Political Science*, 2022, 52/2, p. 977. In this study, “evidence suggests that terrorism (1) fosters antiimmigration sentiment (even though this effect can be short-lived), (2) benefits (right-wing) political parties that hold nativist views, while damaging the electoral position of incumbent governments and (3) leads to stricter migration policies”. However, “there is little evidence that stricter migration policies actually result in less terrorism” (p. 992).



belief, in many countries³³.

Since the 2010s, the link between religion and national identity has been strengthened by the rise of populism - a term accommodating a large diversity of old-dated and contemporary political models, movements and attitudes - not only in Europe but also in the Americas, Africa and Asia³⁴. Among other definitions, it may be seen "as a political style that sets 'sacred' people against two enemies: 'elites' and 'others'"³⁵. In Western populisms,

"the role of religion [...] seems to be almost entirely identitarian and negative: it is about what distinguishes the 'civilised' western societies from 'barbaric' Muslims. [...] populist politicians evoke a reinvented Christian past to warn about the existential threat of its loss in the face of invading Muslims robbing it from the present. 'The people' therefore must expel these Muslims from the nation's future to guarantee its survival"³⁶.

Rogers Brubaker has examined a distinctive feature of the populisms of Northern and Western Europe compared to the rest of the Western world, that is, the construction of "the opposition between self and other not in narrowly national but in broader civilizational terms"³⁷. Islam is regarded as a civilizational threat, and this preoccupation has led to the increasing importance of an "identitarian Christianity" in the most secularized regions of the world³⁸. The scholar has noted that

«[t]alk of "the nation" is not disappearing, but "the nation" is being re-characterized in civilizational terms. Less emphasis is placed on national differences (notably language and specifically national

³³ As regards terrorism alone, see **S. FERRARI**, *Individual Religious Freedom and National Security in Europe After September 11*, in *BYU Law Review*, 2004, 2, pp. 357-384. On migration, see supra note 29.

³⁴ This is the case of India, where it "represents one of the most radical expressions of populism that emerged in the past decades. [...]. The Indian case reveals that populism can significantly affect civil society and civil liberties, such as freedom of religion" (**L. CALLÉJA**, *The Rise of Populism: a Threat to Civil Society?*, 9 February 2020, at <https://www.e-ir.info/2020/02/09/the-rise-of-populism-a-threat-to-civil-society>). For an introduction, see **D. PALANO**, *Populismo*, Editrice Bibliografica, Milano, 2017.

³⁵ **D. NILSSON DEHANAS, M. SHTERIN**, *Religion and the rise of populism*, in *Religion, State & Society*, 2018, 46/3, p. 180.

³⁶ **D. NILSSON DEHANAS, M. SHTERIN**, *Religion and the rise of populism*, cit., p. 178.

³⁷ **R. BRUBAKER**, *Between nationalism and civilizationism: the European populist moment in comparative perspective*, in *Ethnic and Racial Studies*, 2017, 40/8, p. 3.

³⁸ **R. BRUBAKER**, *Between nationalism and civilizationism*, cit., p. 3.



cultural particularities and traditions), more emphasis on civilizational differences (notably religious traditions and their secular legacies)»³⁹.

The populist discourse on religion in Northern and Western Europe has been studied also by Efe Peker, who notes that Christianity is invoked as national/civilizational identity and heritage by politicians and parties that, at the same time, carefully avoid references to actual beliefs or practices. This type of Christianity-centered stance serves anti-immigration purposes⁴⁰.

3 - The controversial stance on religion, citizens and migrants

The heated public and political debate on the line between what belongs to the Western civilization (or its national/Christian variant) and what does not has spilled out onto the judiciary's activity.

In the 2000s in Germany - during the proceedings of the case concerning Ms. Ferestha Ludin, an Afghan-native, naturalized German Muslim woman who had not been appointed to the teaching profession because she wore a headscarf - the Federal Government submitted an opinion to the Federal Constitutional Court stressing the importance of

“the employer's prediction of future danger in that the teacher's conspicuous outer appearance might have a long-term detrimental influence on the peace at the school, in particular because throughout all the lessons the pupils were confronted with the sight of the headscarf and thus the expression of a *foreign* religious belief, without a possibility of avoiding it”⁴¹.

This statement regrettably overlooks the legitimate limitations that a democratic country, like Germany, may pose to the manifestations of religious freedom, like the wearing of a religious symbol. Under the international standards of human rights protection, the right to freedom of thought, conscience and religion includes the freedom to have a religion or a belief of one's choice, and nothing is said concerning its alleged origin

³⁹ R. BRUBAKER, *Between nationalism and civilizationism*, cit., p. 21.

⁴⁰ E. PEKER, *Finding Religion: Immigration and the Populist (Re)Discovery of Christian Heritage in Western and Northern Europe*, in *Religions*, 2022, 13/2, pp. 1-20.

⁴¹ Quoted in FEDERAL CONSTITUTIONAL COURT, Judgment of the Second Senate of 24 September 2003 - 2 BvR 1436/02 - para. 22 (at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2003/09/rs20030924_2bvr143602en.html). The italics is mine.



(domestic or foreign)⁴². In fact, no limitations whatsoever are permitted on the freedom to have or adopt a religion or belief⁴³. As regards the manifestations of this freedom, limitations can (and must) be posed, but they must be consistent with the requirements of a democratic country, including the pursuit of legitimate aims. As known, Art. 9(2) of the European Convention of Human Rights (ECHR) only mentions five legitimate aims: public safety, and protection of public order, health, morals and the rights and freedoms of others⁴⁴. None of them may be (and in fact has been) interpreted so broadly as to exclude “the expression of a foreign belief” from the protection afforded by Art. 9 ECHR.

This case added fuel to an already heated debate on German national identity and immigration. In Baden-Württemberg - the *Land* where the controversy originated - Member of Parliament and prominent politician of the Christian Democratic Union Oettinger recalled Ms. Ludin’s Afghan origin in the context of a speech where Islam was portrayed as a foreign culture. He also referred to “Turkish fellow citizens, who are staying here lawfully”, suggesting that “fellow” were not full or proper citizens, and that they “stayed” as if they were guests or visitors - and not permanent residents, and reinforcing the stereotype of migrants as people living illegally in Germany⁴⁵. Likewise, Minister-President Edmund Stoiber of Bavaria “argued that the headscarf both ‘documents’ and ‘propagates’ foreign values” and “suggested that those migrants who came to Germany had to accept that it was a Christian, Western country”⁴⁶.

⁴² “Everyone has the right to freedom of thought, conscience and religion [...]” (Art. 18 of the Universal Declaration of Human Rights). “Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have [...] a religion or belief of his choice [...]” (Art. 18(1) of the *International Covenant on Civil and Political Rights*). “Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice [...]”: Art. 1(1) of the 1981 Declaration of the General Assembly (see <https://www.ohchr.org/en/special-procedures/sr-religion-or-belief/international-standards>).

⁴³ “Article 18 does not permit any limitations whatsoever on [...] the freedom to have or adopt a religion or belief of one’s choice; [...]”: para. 3 of the Human Rights Committee’s general comment 22 (see <https://www.ohchr.org/en/special-procedures/sr-religion-or-belief/international-standards>).

⁴⁴ Text available at https://www.echr.coe.int/documents/convention_eng.pdf.

⁴⁵ S. SINCLAIR, *National identity and the politics of the ‘headscarf debate’ in Germany*, in *Culture and Religion*, 2012, 13/1, p. 24.

⁴⁶ Quoted by R.A. KAHN, *The headscarf as threat: comparison of German and U.S. legal discourses*, in *Vanderbilt Journal of Transnational Law*, 2007, 40/2, pp. 432-433.



At the time of the Ludin case, eight percent of the total population of Germany, that is, 7.3 million people, were foreigners. Muslims were approximately 3.2 million, including about 450,000 German citizens⁴⁷. However, the perception of migration as a threat and the settlement of a numerous community of Turkish origin do not explain alone the civilizational, anti-immigration and Islamophobic discourse. As Stefanie Sinclair argued, ethnic approaches to German citizenship, based on “an essentialist belief that the German nation is a ‘natural’ category with an ‘authentic’ ethnic core”, which has “to be preserved and protected against ‘other’ ‘foreign’ cultural influences”, “have gained particular relevance since the fall of the Berlin Wall, as they form the basis of the argument that East and West Germans needed to be ‘re-united’ as ‘one people’ (*ein Volk*)”⁴⁸.

In the end the Federal Constitutional Court ruled in favor of Ms. Ludin by five votes to three, but only because the exclusion from a public office lacked any statutory basis⁴⁹: a prohibition was legitimate only insofar as it was prescribed by law. Following what was interpreted as an implicit invitation to adopt legal rules on the matter, half of Germany’s *Länder*⁵⁰ adopted laws allegedly on neutrality, while in fact protecting a national version of it, based on Christian-Western values⁵¹. None of such laws prohibited explicitly the Islamic headscarf, but this was “the focus of the laws’ prior parliamentary debates and explanatory documents, which have emphasized the need to recognize the Western cultural tradition shaped by Christianity (and Judaism)”⁵². Five *Länder*⁵³ exempted religious symbols and attire representing Christian-Western educational values

⁴⁷ V. OEZCAN, *Germany’s High Court Allows Teacher to Wear Muslim Headscarf*, 1 November 2003 (at <https://www.migrationpolicy.org/article/germanys-high-court-allows-teacher-wear-muslim-headscarf>).

⁴⁸ S. SINCLAIR, *National identity*, cit., p. 28.

⁴⁹ FEDERAL CONSTITUTIONAL COURT, Judgment of the Second Senate, cit., paras. 30, 38, 49, 57-58, 61 and 72.

⁵⁰ Baden Württemberg, Bayern, Berlin, Bremen, Hesse, Lower Saxony, North Rhine-Westphalia and Saarland.

⁵¹ C. JOYPKE, *State neutrality and Islamic headscarf laws in France and Germany*, in *Theory and Society*, 2007, 36, p. 328.

⁵² HUMAN RIGHTS WATCH, *Discrimination in the name of neutrality. Headscarf Bans for Teachers and Civil Servants in Germany*, 2009, pp. 1-2 (at https://www.hrw.org/sites/default/files/reports/germany0209_webwcover.pdf).

⁵³ Baden-Württemberg, Bavaria, Hesse, North Rhine-Westphalia and Saarland.



from the general prohibition⁵⁴.

Most of these laws have been challenged before court⁵⁵. In North Rhine-Westphalia, two Muslim employees of German nationality in state interdenominational schools were dismissed because they refused to remove the headscarf while on duty. Under § 57 sec. 4 sentence 1 of the North Rhine-Westphalia Education Act (*Schulgesetz für das Land Nordrhein-Westfalen - SchulG NW*) of 15 February 2005,

“teachers may not publicly express views of a political, religious, ideological or similar nature which are likely to endanger or interfere with the neutrality of the *Land* with regard to pupils and parents, or disturb the political, religious and ideological the peace at school. [...]. Pursuant to sentence 3, carrying out the educational mandate in accordance with the Constitution of the *Land* and accordingly presenting (*Darstellung*) Christian and occidental educational and cultural values or traditions do not contradict the prohibition set out in sentence 1”⁵⁶.

On 27 January 2015, the Federal Constitutional Court by a majority of six votes to two concluded that the limitation was disproportionate because it was “based on the mere abstract potential to endanger the peace at school or the neutrality of the state” and that the restriction could have been applied only if there had been “at least a sufficiently specific danger to the protected interests”⁵⁷. It also held that

“§ 57 sec. 4 sentence 3 SchulG NW, which is designed to privilege Christian and occidental educational and cultural values or traditions, is not consistent with the prohibition on disadvantaging

⁵⁴ HUMAN RIGHTS WATCH, *Discrimination in the name of neutrality*, cit., pp. 25-27.

⁵⁵ HUMAN RIGHTS WATCH, *Discrimination in the name of neutrality*, cit., pp. 31-35 and 37-38; OPEN SOCIETY JUSTICE INITIATIVE, *Restrictions on Muslim Women’s Dress in the 28 EU Member States: Current Law, Recent Legal Developments, and the State of Play*, 2018, pp. 46-47, in <https://www.justiceinitiative.org/uploads/dffdb416-5d63-4001-911b-d3f46e159acc/restrictions-on-muslim-womens-dress-in-28-eu-member-states-20180709.pdf>; E. HOWARD, *Religious clothing and symbols in employment. A legal analysis of the situation in the EU Member States*, 2017, pp. 85 and 94 (at https://ec.europa.eu/newsroom/just/document.cfm?action=display&doc_id=48810); J.M. MUSHABEN, *Women Between a Rock and a Hard Place: State Neutrality vs. EU Anti-Discrimination Mandates in the German Headscarf Debate*, in *German Law Review*, 2013, 14/9, p. 1768.

⁵⁶ Quoted by the press release no. 14/2015 of 13 March 2015 (at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2015/01/rs20150127_1bvr047110en.html).

⁵⁷ FEDERAL CONSTITUTIONAL COURT, Order of the First Senate of 27 January 2015 - 1 BvR 471/10 - headnote 2 (at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2015/01/rs20150127_1bvr047110en.html).



persons on religious grounds (Art. 3 sec. 3 sentence 1 and Art. 33 sec. 3 GG). [...].

The partial requirement under section 3 of the provision [...] constitutes a disadvantaging on the grounds of faith and religious beliefs that is contrary to equal treatment [and] results in the disadvantaging of followers of religions other than the Christian and Jewish faiths that cannot be justified under constitutional law⁵⁸.

In Italy, the tension between migration and Western values and the ensuing civilizational discourse have interestingly affected the judiciary's activity in cases unrelated to Islamic symbols like the headscarf⁵⁹.

One prominent example is the case of Ms. Soile Lautsi, an Italian national of Finnish origin and a member of the Union of Atheists and Rationalist Agnostics, who complained about the display of a crucifix in the classroom of the public school attended by her sons. A great amount of literature has been produced on this controversy, which reached the European Court of Human Rights (ECtHR)⁶⁰. Its detailed examination goes well beyond the purposes of this paper. What is relevant here is the judgment delivered by the Regional Administrative Court of Veneto of 17 March 2005, which dismissed the application. Its legal reasoning is a collection of all those extra-legal arguments, which should never find a place in a legal text like a court verdict. Admittedly, the Court "is aware that it is setting out along a rough and in places slippery path"⁶¹. But, as the saying goes, the road to hell is paved with good intentions. Thus, the Court cannot help but observe "that Christianity, and its older brother Judaism - at least since Moses and certainly in the Talmudic interpretation - have placed tolerance towards others and protection of human dignity at the centre of their faith".

The relevance of the mention of Moses and the Talmud for the solution of this case is unclear. Next is a sort of theological digression on

⁵⁸ **FEDERAL CONSTITUTIONAL COURT**, Order of the First Senate, cit., paras. 78 and 123-124.

⁵⁹ On religious symbols as a whole, see **S. TESTA BAPPENHEIM**, *I simboli religiosi nello spazio pubblico. Profili giuridici comparati*, Editoriale Scientifica, Napoli, 2019.

⁶⁰ **ECtHR**, *Lautsi and Others v. Italy*, application no. 30814/06, judgment of 3 November 2009; [Grand Chamber], judgment of 18 March 2011. In the vast literature on this case, see inter alia J. TEMPERMAN (ed.), *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom*, Martinus Nijhoff Publishers, Leiden, 2012.

⁶¹ The English translation of this and the following excerpts is available in **ECtHR** [Grand Chamber], *Lautsi and Others v. Italy*, application no. 30814/06, judgment of 18 March 2011, para. 15.



Christianity's "strong emphasis placed on love for one's neighbour" and "the explicit predominance given to charity over faith itself", accompanied by a historical excursus on this religion's contribution to the Enlightenment and to the development of "those ideas of tolerance, equality and liberty which form the basis of the modern secular State, and of the Italian State in particular". Like heirs of Dante's poetry tradition and use of such figures of speech as the similitude, the judges state that

"[t]he link between Christianity and liberty implies a logical historical coherence which is not immediately obvious - like a river in a karst landscape which has only recently been explored, precisely because for most of its course it flows underground".

Thus, they insist that

"the principles of human dignity, tolerance and freedom, including religious freedom, and therefore, in the last analysis, the foundations of the secular State" are "the constant central core of Christian faith, despite the inquisition, despite anti-Semitism and despite the crusades".

What said so far would suffice for the court to conclude that it would "be something of a paradox to exclude a Christian sign from a public institution in the name of secularism, one of whose distant sources is precisely the Christian religion"⁶². However, it goes on to highlight a last, but not least important aspect of the display of the crucifix in the classrooms of public schools - its pedagogic value for non-European Union (EU) migrants. The court emphasizes

"that the symbol of the crucifix, thus understood, now possesses, through its references to the values of tolerance, a particular scope in consideration of the fact that at present Italian State schools are attended by numerous pupils from outside the European Union, to whom it is relatively important to transmit the principles of openness to diversity and the refusal of any form of fundamentalism - whether

⁶² On the transformation of the crucifix from a religious to a secular symbol, see **F. ALICINO**, *L'invenzione del principio "supremo" di laicità*, in *Laicità in Europa/Laicità in Italia: intersezioni simboliche*, ed. by F. ALICINO, C. CIOTOLA, Editrice Apes, Roma, 2012, p. 18; **J. PASQUALI CERIOLI**, *La laicità nella giurisprudenza amministrativa: da principio supremo a "simbolo religioso"*, in *Stato, Chiesa e pluralismo confessionale. Rivista telematica* (<https://www.statoechiese.it>), March 2009, pp. 9-15. For a general discussion on the different meanings attached to the cross and the crucifix, see **F.M GEDICKS, P. ANNICCHINO**, *Cross, crucifix, culture: an approach to the constitutional meaning of confessional symbols*. EUI Working Paper RSCAS 2013/88, 2013 (at https://cadmus.eui.eu/bitstream/handle/1814/29058/RSCAS_2013_88.pdf?sequence=1&isAllowed=y).



religious or secular - which permeate our system. Our era is marked by the ferment resulting from the meeting of different cultures with our own, and to prevent that meeting from turning into a collision it is indispensable to reaffirm our identity, even symbolically, especially as it is characterised precisely by the values of respect for the dignity of each human being and of universal solidarity”.

The least that can be said is that the alarming increase of phenomena like racism and other forms of hatred makes it necessary and urgent that all pupils and students - Italian and non-Italian alike - are taught the values of respect and tolerance. But apart from other considerations, it is striking that “pupils from outside the European Union” are singled out, as to suggest that non-Italians from EU member states are more familiar with the Christian-Western cultural environment than non-EU citizens (a group which nevertheless includes nationals of Switzerland, Norway, the United Kingdom, the United States of America, and so on). The Lautsi case has thus exceeded the boundaries of a conflict of views between Catholic and secularist individuals and groups⁶³ (whose belonging to the same political community has not been questioned), and it has been transposed into the broader context of the migration issue and the civilizational discourse.

Last but not least is a judgment delivered by the Italian Court of Cassation on 31 March 2017, confirming the penalty inflicted to a Sikh carrying the kirpan in the street for breach of Art. 4(2) of Law no. 110/1975 on cold weapons. Critics have focused not so much on the conclusions of the court as on the arguments used to reach them⁶⁴. In particular, the judges have made the controversial statement that “there is an essential obligation for the immigrant to conform his/her values to those of the Western world, into which he/she freely chooses to fit”⁶⁵.

Firstly, here too the judges assume that “immigrant” is a synonym of

⁶³ The term ‘Catholic’ is used here instead of ‘Christian’, because not all Christian Churches accept the crucifix as a religious symbol. For example, the Waldensians and the Methodists only accept the cross and reject the use and display of the crucifix on theological grounds (see <https://www.chiesavaldese.org/aria cms.php?page=4>). As regards the term ‘secularist’, this should be understood as encompassing the worldviews of “atheists, agnostics, sceptics and the unconcerned” (categories identified by the ECtHR, *Kokkinakis v. Greece*, application no. 14307/88, judgement of 25 May 1993, para. 31).

⁶⁴ See **A. NEGRI**, *Sikh condannato per porto del kirpan: una discutibile sentenza della Cassazione su immigrazione e “valori del mondo occidentale”*, in *Diritto penale contemporaneo*, 2017, 7-8, pp. 246-250.

⁶⁵ Court of Cassation, judgment no. 24048 of 31 March 2017, para. 2.3. The translation is mine (Text in Italian language available at https://archivioidpc.dirittopenaleuomo.org/upload/Cass_24084_2017.pdf).



“person unfamiliar with Western values”. Secondly, the obligation should be limited to the compliance with the law and, it goes without saying, this applies to everyone - citizens and foreigners alike. Thirdly, the court seems to ignore that the Western world includes countries where an exemption from the general prohibition to carry cold weapons in the public space has been granted to Sikhs, like the United Kingdom⁶⁶ and Canada⁶⁷, as well as the United States of America where the right to keep and bear arms is even protected by the Bill of Rights⁶⁸. In fact, the Western world is far more diverse than it is assumed by theorists of the Western identity as something homogeneous. This leads to the fourth point of criticism. The reference to the “values of the Western world” is “strongly evocative, but indeed very vague and undefined”. At the same time, this expression is very precise in excluding “a typically ‘Western’ value [...]”:

⁶⁶ Section 47 of the Offensive Weapons Act 2019 «provides an additional defence with respect to swords with curved blades of 50cm or longer. Some kirpans can fall under this definition of an offensive weapon to which section 141 of the Criminal Justice Act 1988 applies. A kirpan which is less than 50cm is not captured by the legislation. It is already a defence under section 139 of the Criminal Justice Act 1988 to possess one in public for religious reasons to ensure that a person of Sikh faith can possess a kirpan. It was similarly a defence to the offence under s141 of that Act (manufacture, sale, hire etc) where such conduct was for the purposes of use in religious ceremonies. This defence applies to possession in private, and this section modifies the defence extending it from “religious ceremonies” to “religious reasons”. In addition, section 47 provides a new defence to the offence of possession in private for Sikhs possessing such swords for the purposes of presenting them to others at a religious ceremony or other ceremonial event and for the recipients, whether they are a Sikh or not, to possess swords that they have been presented with. It also provides a defence for the ancillary acts, where they are for that end purpose e.g. the manufacture and sale, act of giving etc. This ensures the act of ceremonial gifting of the Sikh kirpan can lawfully occur» (<https://www.gov.uk>).

⁶⁷ In 2006 the Supreme Court of Canada issued a landmark decision (*Multani v. Commission scolaire Marguerite-Bourgeoys*) declaring the nullity of the decision of the governing board of a school, which had prohibited a Sikh from wearing the kirpan at school. In 2017 Transport Canada updated its Prohibited Items List to allow for blades of six centimeters or less on all domestic and international flights, except to the USA. Nevertheless, the wearing of the kirpan has been prohibited in other places, such as the National Assembly of Quebec in 2011. See **V. STOKER**, *Zero Tolerance? Sikh Swords, School Safety, and Secularism in Quebec*, in *Journal of the American Academy of Religion*, 2007, 75/4, pp. 814-839; **R.K. DHAMOON**, *Exclusion and regulated inclusion. The case of the Sikh kirpan in Canada*, in *Sikh Formations. Religion, Culture, Theory*, 2013, 9/1, pp. 7-28.

⁶⁸ This consists in the first ten amendments to the United States constitution. The Second Amendment reads: “A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed” (Text available at https://www.senate.gov/civics/constitution_item/constitution.htm).



cultural and religious pluralism”⁶⁹. This has been referred to in two landmark decisions by the ECtHR. The first one stresses the link between the right to freedom of religion or belief and pluralism.

“As enshrined in Article 9 [ECHR], freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it”⁷⁰.

The ECtHR is aware that pluralism did not descend like manna from heaven but has been the result of bloody conflicts that ravaged Europe for centuries. It is also mindful that pluralism may not be taken for granted. The respect for and promotion of differences help to preserve the pluralist character of a democratic society, but differences may also become a source of conflict. This is usually regarded as a negative factor, but it should be remembered that a democratic society is not one without conflicts, but one managing conflicts in a democratic way. In fact, in a later judgment,

“[a]lthough the Court recognises that it is possible that tension is created in situations where a religious or any other community becomes divided, it considers that this is one of the unavoidable consequences of pluralism. The role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other”⁷¹.

In this context, the expectation that a country’s national identity continues to be founded on one or more specific religious traditions is legitimate, but it does not justify a civilizational discourse excluding those who do not identify (or are not perceived of as identifying) themselves in such traditions - be them migrants or naturalized citizens still regarded as foreigners. The message that needs to be repeated over and over again is

⁶⁹ A. NEGRI, *Sikh condannato per porto del kirpan: una discutibile sentenza della Cassazione su immigrazione e "valori del mondo occidentale"*, in *Diritto penale contemporaneo*, 2017, 7-8, p. 247.

⁷⁰ ECtHR, *Kokkinakis v. Greece*, application no. 14307/88, judgment of 25 May 1993, para. 31.

⁷¹ ECtHR, *Serif v. Greece*, application no. 38178/97, judgment of 14 December 1999, para. 53.



that the best way to protect Western values is the promotion of a “shared”, “universalistic”, “integrative”, and not merely formal citizenship⁷². Democratic countries (a family to which Western states claim to belong) are such only as long as they remain pluralist and accommodate diversity. Although limitations must be applied on unacceptable manifestations of the freedom of religion or belief, these must pursue only legitimate aims under international standards, which do not include such a thing as the protection of Western values.

4 - Promoting Western values or international standards of human rights protection?

The reference to the promotion of Western values in cases concerning the right to freedom of religion or belief is inopportune and undesirable also in the context of the “history of the emergence of human rights within the Western Christian tradition”⁷³. While some scholars have held that human rights are universal because they are “based on universal values found in all major civilizations of the world”⁷⁴, like Hinduism⁷⁵, Buddhism and Islam⁷⁶, others emphasize their European conservative Christian roots:

“if human rights should remain central to collective politics, they would have to come in a version that would finally transcend their Christian incarnation - for in a certain sense, the Muslim headscarf cases show contemporary human rights to be not too secular but not secular enough”⁷⁷.

⁷² On this notion of citizenship, see **A. ANGELUCCI**, *Libertà religiosa e cittadinanza integrativa. Alcune note sul ‘vivere assieme’ in una società plurale*, in *Stato, Chiese e pluralismo confessionale*, cit., n. 39 del 2017, pp. 1-13.

⁷³ **C. VILLA-VICENCIO**, *Christianity and human rights*, in *Journal of Law and Religion*, 1999-2000, 14/2, p. 579.

⁷⁴ **S.P. SUBEDI**, *Are the principles of human rights “Western ideas”? An analysis of the claim of the “Asian” concept of human rights from the perspectives of Hinduism*, in *California Western International Law Journal*, 1999, 30/1, p. 45.

⁷⁵ **D. PATEL**, *The Religious Foundations of Human Rights: A Perspective from the Judeo-Christian Tradition and Hinduism*, 2005 (at <https://www.nottingham.ac.uk/hrlc/documents/publications/hrlcommentary2005/religiousfoundationshumanrights.pdf>).

⁷⁶ **R.P. VYAS, R. MURARKA**, *Understanding Human Rights from an Eastern Perspective: A Discourse*, in *Asian Yearbook of International Law*, 2018, 24, pp. 46-50.

⁷⁷ **S. MOYN**, *Christian Human Rights*, University of Pennsylvania Press, Philadelphia, 2015, p. 167.



The result would be the creation of a discriminatory secular political space⁷⁸, biased against Islam while “Christian practices are given a pass”⁷⁹.

What is relevant for our purposes is not so much the issue of the origin of human rights, as their universal value. According to Panikkar, who wrote as early as 1982, the notion of human rights is a Western - and not a universal - concept, but to accept the fact that it “is not universal does not yet mean that it *should not become so*”⁸⁰. The discourse on human rights is based on “the assumption of a *universal human nature* common to all peoples”⁸¹. Every individual’s dignity “is probably the major thrust of the Modern question of Human Rights. Human Rights defend the dignity of the individual *vis-à-vis* Society at large, and the State in particular”⁸².

Amongst the obstacles to the universalization of human rights and acceptance of their values as the entire humankind’s heritage, there is their use - in the past and regrettably also in the present - as an instrument of political, economic and cultural “more or less conscious domination exerted by the powerful nations to maintain their privileges and defend the *status quo*”⁸³. For example, women’s rights have been a powerful ideological issue in the harshest stage of colonization. As known, colonialism was ideologically supported by the idea of the existence of superior and inferior “races”, whereby the former had to civilize the latter. As highlighted by Leila Ahmed, this theory was “corroborated by “evidence” gathered in those societies by missionaries and others”⁸⁴, including proofs on the oppression of women.

“Colonial feminism, or feminism as used against other cultures in the service of colonialism, was shaped into a variety of similar constructs, each tailored to fit the particular culture that was the immediate

⁷⁸ S. MOYN, *Christian Human Rights*, cit., p. 139.

⁷⁹ S. MOYN, *Christian Human Rights*, cit., p. 165.

⁸⁰ R. PANIKKAR, *Is the notion of human rights a Western concept?*, in *Diogenes*, 1982, 30/120, p. 84.

⁸¹ R. PANIKKAR, *Is the notion*, cit., p. 80.

⁸² R. PANIKKAR, *Is the notion*, cit., pp. 81-82. On the emergence of human rights as a response to tyranny and oppression, and as being morally founded on the right to self-defense against such threats, see D. LITTLE, *The organic unity of human rights and the place of freedom of religion or belief: Challenge and response*, in *Routledge Handbook of Freedom of Religion or Belief*, cit., pp. 249-264.

⁸³ R. PANIKKAR, *Is the notion*, cit., p. 86.

⁸⁴ L. AHMED, *Women and Gender in Islam. Historical Roots of a Modern Debate*, Yale University Press, New Haven, 1992, p. 151.



target of domination - India, the Islamic world, sub-Saharan Africa"⁸⁵.

In particular, Islam - regarded as *the enemy* - was alleged to be "innately and immutably oppressive to women"⁸⁶, as epitomized by the headscarf and segregation. Colonial feminism was used by men serving the colonial administration, like Lord Cromer (1883-1907) in Egypt, who attacked Egyptian men for upholding practices believed to degrade women, like the wearing of the headscarf⁸⁷. However, as one of the founders and the first president of the Men's League for Opposing Woman Suffrage, he opposed at the same time women's rights in his own country⁸⁸. There may seem to be a contradiction here, but in fact allegations on women's inferiority perfectly fit into the discourse of superior/inferior human beings. The evidence collected during the colonial expansion to justify ideologically the "white man's burden"⁸⁹ was also used to corroborate Victorian theories on women's biological inferiority⁹⁰. Whites were held to be superior to non-whites, just as men to women. It should also be stressed that colonial feminism was not fully relegated to the realm of history after the end of the age of colonialism. In fact, it revives in the contemporary debate on the headscarf and, more generally, on the relationship between the West and Islam⁹¹.

⁸⁵ L. AHMED, *Women and Gender*, cit., p. 151.

⁸⁶ L. AHMED, *Women and Gender*, cit., p. 152.

⁸⁷ F. EL GUINDI, *Veiling resistance*, in *Fashion theory*, 1999, 3/1, p. 67. The figure of Lord Cromer can be contrasted to that of Malak Hifni Nasif (1886-1918), an Egyptian feminist and a supporter of a type of feminism not affiliated with unconditional Westernization. She was against mandatory unveiling, and she rather focused on two different, fundamental issues to promote authentic female emancipation: 1) the opening of all fields of higher education to women, including engineering, mathematics and economics, as well as Arabic and Islamic studies, and 2) the making of space in mosques for women to participate in public prayer. See F. EL GUINDI, *Veiling resistance*, cit., pp. 65-67.

⁸⁸ "The giving of votes to women, with its consequence, universal adult suffrage, and its corollary, the woman M.P., would lower the quality of our legislation, would increase the number of capricious, emotional, meddling laws, and would therefore in many cases bring the law into contempt and render it a dead letter" (excerpt from a *booklet entitled The woman MP: a peril to women and the country*, quoted in <https://www.wcml.org.uk/blogs/Lynette-Cawthra/Mens-League-for-Opposing-Woman-Suffrage>).

⁸⁹ Title of a poem by Rudyard Kipling of 1899.

⁹⁰ L. AHMED, *Women and Gender*, cit., p. 151.

⁹¹ A. AL-REBHOLZ, *Intersectional Constructions of (Non-) Belonging in a Transnational Context: Biographical Narratives of Muslim Migrant Women in Germany*, in *Identity and*



Another noteworthy historical example of the Western abuse of the human-rights discourse - still having effects in our times - is the peace treaty of Sèvres signed at the end of the First World War, on 10 August 1920, between the victorious European Powers and the defeated Ottoman Empire. As known, the heavily punitive treaty proved to be as fragile as the porcelain produced at Sèvres and never entered into force, but its symbolic importance has never faded away. Its signing persuaded once for all Turkish nationalists, who were fighting a liberation war against the Allied occupation forces, that the Great Powers pursued the annihilation of the Turks. The solution to the Oriental Question provided by the treaty was founded on two pillars: the Ottoman exclusion from Europe and the dividing up of the Asian provinces⁹². At that time, André Mandelstam - "a pioneer of the idea of the international protection of human rights", "[t]oday almost forgotten"⁹³ - referred to the disappearance of the Ottoman Empire as one of the guarantees for the advent of human rights⁹⁴, and his opinion was widely shared.

At this regard, Taner Akçam argued that one of the reasons justifying the punitive character of the treaty had been the Armenian genocide. However, the effort made by the European states to protect their own colonial interests, as well as their ancient desire to split up the Ottoman territories resulted in the transformation, in the Turkish nationalists' eyes, of the humanitarian intervention into a hypocritical façade⁹⁵. Suffice it to note that the peace treaty included provisions unrelated to the regulation of the Ottoman territories. Art. 113 concerned the Anglo-Egyptian convention on the Sudan (a non-Ottoman territory). Art. 121 established the French protectorate over Morocco (another non-Ottoman territory). The Ottoman delegation stressed that it was not concerned with such issues, but the Allied powers insisted on the

Migration in Europe: Multidisciplinary Perspectives, ed. by M.C. LA BARBERA, Springer, Berlin, 2015, pp. 59-60.

⁹² A. GIANNINI, *L'ultima fase della questione orientale (1913-1932)*, Istituto per l'Oriente, Roma, 1933, pp. 40-41; A. RAPISARDI-MIRABELLI, *Le traité de Sèvres (10 août 1920) et les principales questions internationales qui s'y rapportent*, in *Revue de droit international et de législation comparée*, 1921, 2, pp. 416 and 435.

⁹³ H.P. AUST, *From Diplomat to Academic Activist: André Mandelstam and the History of Human Rights*, in *The European Journal of International Law*, 2015, 25/4, p. 1107.

⁹⁴ A. MANDELSTAM, *Le sort de l'Empire ottoman*, Librairie Payot et C.ie, Paris, 1917, pp. 567-584.

⁹⁵ T. AKÇAM, *Nazionalismo turco e genocidio armeno. Dall'Impero ottomano alla Repubblica*, Guerini e Associati, Milano, 2005, pp. 190-191.



inclusion of those clauses, in order to strengthen their claims before the international community⁹⁶.

The burden of the collective memory of that injustice (the so-called Sèvres syndrome) helps to explain why the Republic of Turkey, the successor state to the Ottoman Empire, has always been so obstinately defiant and uncooperative when international organizations urged it to respect the fundamental freedoms especially of the religious, ethnic and language minorities. Turkey has been equally recalcitrant to fully adopt the *acquis communautaire*, although it applied for EU membership on its own initiative. All complaints about human rights violations - just like any request to adopt laws liable to undermine Turkish sovereignty in the economic, social and cultural fields - have often been regarded as sneaky attempts by Europe to revive the ancient interferences in the country's internal affairs. According to a part of the Turkish public opinion, human rights are not much more than a mask hiding Europe's never-died imperialistic ambitions⁹⁷.

Turkey is an interesting example of another relevant aspect of the ambiguous relationship between Western values and international standards of human rights protections, that is, the Western world's application of a double standard. Today the Republic of Turkey's poor record in respecting fundamental freedoms attracts much criticism on the part of the West - and rightly so. However, one may not neglect that human rights violations and authoritarianism have characterized Turkey throughout its entire republican history. In the years 1959-2021, the ECtHR delivered 3,385 judgments finding at least one violation of the ECHR committed by Turkey, which regrettably ranks first amongst the member states of the Council of Europe by number of violations⁹⁸. Most of them predate Mr. Erdoğan's rise to power⁹⁹. However, as long as Turkey proved to be a faithful ally in military security and foreign policies - especially during the Cold War as a member of the North Atlantic Treaty Organization (NATO) - at least part of the Western world turned a blind eye to the systematic repression of all identity manifestations different

⁹⁶ A. GIANNINI, *L'ultima fase*, cit., pp. 81-82.

⁹⁷ See N. CANEFE, T. BORA, *Intellectual Roots of Anti-European Sentiments in Turkish Politics: the Case of Radical Turkish Nationalism*, in *Turkish Studies*, 2003, 4/1, pp. 127-148.

⁹⁸ https://www.echr.coe.int/Documents/Stats_violation_1959_2021_ENG.pdf.

⁹⁹ On Mr. Erdoğan's Turkey, see V.R. SCOTTI, *La Turchia di Erdoğan*, il Mulino, Bologna, 2022.



from the national ideal-type promoted at the official level¹⁰⁰. It has been argued that

“Turkey’s participation in NATO’s military operations as the sole Muslim ally, in the post-Cold War era, enabled NATO to build an identity as a global security actor in crisis management while Turkey’s active role in these operations served to keep Turkey’s sense of prominence in the protection of the universal values and, thus, its claim to Western identity”¹⁰¹.

Nevertheless, the misalignment between Turkey and the other NATO member states - increased in the past two decades¹⁰² and more visible than ever in the contemporary international crisis produced by the Russian invasion of Ukraine - is just the latest evidence that the defense of Western identity is not the same thing as the protection of human rights.

5 - Concluding remarks

The reference to the promotion of Western values as a limitation to the manifestations of migrants’ human rights, including religious freedom, is questionable for two reasons.

The first one is its legal irrelevance in the international standards of human rights protection. It is well known that the right to manifest the right to freedom of religion or belief is derogable, and it may never be assumed that human-rights norms afford protection to whatever religiously- or philosophically-inspired behavior. A democratic country can - and I would say has the obligation - to prohibit or limit incompatible manifestations, but incompatibility must be assessed vis-à-vis the international standards of human rights protection, and not Western values. As already noted, only a specific set of legitimate aims may justify restrictions on the manifestations of the right to freedom of religion or belief, and these do not include such a thing as the protection of Western values (or their national/Christian variants). This is not to say that

¹⁰⁰ L. KOMISAR, *A blind eye on Turkey*, 3 April 1995 (at <https://www.washingtonpost.com/archive/opinions/1995/04/03/a-blind-eye-on-turkey/6b214965-d040-44d6-97ce-102fc0b8a374>).

¹⁰¹ M. KINACIOĞLU, A.G. GÜRZEL, *Turkey’s Contribution to NATO’s Role in Post-Cold War Security Governance: The Use of Force and Security Identity Formation*, in *Global Governance*, 2013, 19, p. 589.

¹⁰² U. KUMCUOĞLU, *Time for a Complete Makeover in Turkish-U.S. Relations*, January 2020 (at <https://www.gmfus.org/news/time-complete-makeover-turkish-us-relations>).



Western (or national/Christian) heritage may not found a legitimate place in a country's national identity, or that the role of one or more specific religions in history should be ignored altogether¹⁰³. However, it seems to me that one thing is the promotion of the cultural and historical heritage of a country, which includes the religious factor, and another thing is the legal use of this legacy to exclude some groups and their members from the political community or to rate them as second-class citizens. At this regard, what is especially disturbing is the exploitation of Christianity in civilizational discourses by politicians and parties whose Christian credentials are rather dubious. This is true in particular for the populisms of Northern and Western Europe, which applaud Christianity for its secular qualities and refrain from any meaningful references to its beliefs, doctrine, theology and practices¹⁰⁴. Christianity often has a place in the public and political discourse not so much to promote Christian values as to reject other, "foreign" ones (typically, although not exclusively, those of Islam)¹⁰⁵.

The second reason is the possible, detrimental effect of the civilizational discourse in the international arena. When human rights are propagated or understood basically as Western values, their credibility is liable to be severely undermined. Their promotion risks being seen as an instrument to mask the expansion of the West's economic, cultural and political influence. I would like to stress that this should not be interpreted as a support for the prejudices and stereotypes of Occidentalism and its

¹⁰³ "There is no citizenship without identity" (A. FERRARI (ed.), *Libertà religiosa e cittadinanza. Percorsi nella società plurale*, Marsilio, Venezia, 2017, p. 1). The place that religion has played in the building of a national identity is expressly recognized by the ECtHR, which has reiterated in its case law that "[i]t is not possible to discern throughout Europe a uniform conception of the significance of religion in society [...], and the meaning or impact of the public expression of a religious belief will differ according to time and context [...]. Rules in this sphere will consequently vary from one country to another according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order [...]. Accordingly, the choice of the extent and form such regulations should take must inevitably be left up to a point to the State concerned, as it will depend on the specific domestic context" (ECtHR [Grand Chamber], *Leyla Şahin v. Italy*, application no. 44774/98, judgment of 10 November 2005, para. 109). See also F. TULKENS, *The European Convention on Human Rights and Church-State Relations. Pluralism vs. Pluralism*, in *Stato, Chiese e pluralismo confessionale*, cit., February 2011, p. 4.

¹⁰⁴ E. PEKER, *Finding Religion*, cit., pp. 8 and 14.

¹⁰⁵ E. PEKER, *Finding Religion*, cit., pp. 3 and 8-9.



dehumanizing image of the West¹⁰⁶, nor as a justification for troublesome statements like those issued by Patriarch Kirill of Moscow who - on the basis of his belief that “contemporary universal standards on human rights are by their nature exclusively liberal Western standards”¹⁰⁷ - has gone as far as saying that “Russia’s war on Ukraine is justified to combat Western gay lobbies”¹⁰⁸. It is inescapable that governments and institutional subjects both in the Western world and outside it abuse the human-rights discourse for their own political purposes. Nevertheless, it is the individuals, the communities and the societies at large that must be persuaded that the promotion of human rights does not imply the loss of non-Western cultures, but it is the strongest and most durable instrument to protect everybody’s right to self-determination, regardless of their legal status (citizen or migrant) or social position (member of the majority or a minority group). Only by going beyond the ‘West versus non-West’ approach, it is possible to make human rights truly universal values, accepted and protected by human beings all over the world as the most precious safeguard of their dignity.

¹⁰⁶ On this phenomenon, see **I. BURUMA, A. MARGALIT**, *Occidentalism. The West in the Eyes of Its Enemies*, The Penguin Press, New York, 2004.

¹⁰⁷ Quoted by **L. MÄLKSOO**, *The Human Rights Concept of the Russian Orthodox Church and its Patriarch Kirill I: A Critical Appraisal, in Russia and European Human-Rights Law. The Rise of the Civilizational Argument*, ed. by L. MÄLKSOO, Brill, Leiden, 2014, p. 17.

¹⁰⁸ See https://www.ansa.it/english/news/vatican/2022/03/09/ukraine-kirills-gay-lobby-claim-favours-escalation_b97d55e4-46e9-45a5-8152-132a15c7f249.html.